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FILED
FEB 23 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-260

IN THE

Supreme Court of the United States

JOEL SEREBOFF AND MARLENE SEREBOFF,

Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* SOUTHWEST CARPENTERS HEALTH & WELFARE TRUST (FKA CARPENTERS HEALTH & WELFARE TRUST FOR SOUTHERN CALIFORNIA) IN SUPPORT OF RESPONDENT MID ATLANTIC MEDICAL SERVICES, INC.

DESMOND C. LEE
DECARLO & CONNOR
533 South Freemont Avenue
Los Angeles, CA 90071
(213) 488-4100

Counsel for Amicus Curiae

199689

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICUS CURIAE*[1]

The Southwest Carpenters Health & Welfare Trust (*fka* Carpenters Health & Welfare Trust for Southern California) ("Trust") is a multi-employer welfare benefit plan established pursuant to a collective bargaining agreement. The Trust provides benefits to approximately 88,000 eligible carpenters and their families, and paid approximately $189 million in health and welfare benefits in 2005. Like Respondent Mid Atlantic Medical Services, Inc. ("Mid Atlantic"), the Trust is governed by the Employee Retirement Income Security Act ("ERISA"). The issue raised here is of keen importance to the Trust, its Board of Trustees (who, like Mid Atlantic, are fiduciaries under ERISA), and the thousands who depend on the Trust for crucial, often lifesaving health benefits. The resolution of this issue will directly impact the financial ability of the Trust to provide health benefits under conditions in which the cost of healthcare continues to spiral constantly higher.[2]

According to recent U.S. Department of Labor figures, approximately 137 million people depend on private sector

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1. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this brief are being submitted herewith.

2. On January 31, 2005, the Trust petitioned for a writ of certiorari from the decision in *Carpenters Health & Welfare Trust v. Vonderharr*, 384 F. 3d 667 (CA9 2004). The Trust sought review of essentially the same reimbursement issues now before this Court. While the petition was pending, the Trust settled its dispute with the participant. As a result, on November 28, 2005, the Court denied the Trust's petition. The issues cited in the Trust's petition in *Vonderharr* remain unresolved.

employer-sponsored health plans covered by ERISA, which struggle to provide health benefits despite a rising tide of healthcare costs that constantly threatens millions of Americans workers with a reduction or loss of their crucial health benefits.[3] The terms of many of these plans, including the Trust, contain reimbursement provisions intended to help the plans meet this massive healthcare burden by requiring participants to reimburse their plans for the cost of a participant's healthcare when the participant actually recovers those costs from the third party responsible for the plan's expenditures.

Apart from defeating the plans' efforts to place the burden of healthcare costs on the third parties that caused the need for that care, the reimbursement rules of the Sixth and Ninth Circuits which erect a per se ban on reimbursement also create a manifest unfairness to other plan participants who depend on the plans for healthcare benefits. Participants like the Sereboffs unjustly reap a double recovery by first receiving payments made by the plans on their behalf to healthcare providers, and then by keeping the amounts actually paid by third parties for the healthcare costs that were *already paid* by the plan.[4] Like the accidents that cause

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3. The proposition that healthcare costs are skyrocketing is beyond dispute. According to an AON Consulting study, healthcare was the "top employee benefits challenge" in 2003. AON projected that health and welfare plans could sustain an eight percent "affordable limit" in the increase of healthcare costs. However, the study projected that healthcare costs were likely to increase at a staggering 14 percent rate. In real numbers, this means that, by 2008, plans will be able to afford to spend only an average of $7,650 per employee, but must somehow scramble to pay the $10,600 per employee figure that is projected for that year.

4. *See* John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-*

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healthcare expenditures, this double recovery also has victims — other plan participants who are unable to obtain benefits because limited plan resources have been spent where there was a third party that in fact paid for those expenses, but the payment was kept by the participant. The district court in *Vonderharr* eloquently expressed the common sense impropriety of such a result:

> Defendants did not seek to benefit other ERISA participants and beneficiaries of the plan. By retaining the money expended by [the Trust] on their behalf while receiving funds from the underlying state court settlement, [defendants] have actually reaped a windfall at the expense of all. . . . Ultimately the legal question decided in this case will benefit only a subset of participants and beneficiaries. Moreover, as discussed above, Defendants did not seek to vindicate a right under ERISA as much as they sought to secure a windfall from [the Trust's] inability to obtain reimbursement. [*Vonderharr* (CD Cal. No. CV-02-04920-GHK (2003)]

The Sereboffs shamelessly shrug off their own admission that it "is perhaps true as a matter of fairness" that "the funds in question 'belong in good conscience to the Plan.'" Brief for Petitioners at 21 (quoting the district court decision). Brazenly, but not surprisingly, the Sereboffs contend that "mere fairness" is the "wrong criteria" for the analysis. *Id.* "Mere fairness" they contend can be avoided if the Court

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West, 103 Colum. L. Rev. 1317, 1366 (2003) (such rules are a "favorite of the plaintiffs' tort bar, because they increase aggregate recoveries, allowing a plaintiff to recover twice for the same injury: once from the health insurer or health plan and again from the tortfeasor or its insurer").

will simply adopt rules that in effect read core provisions of ERISA — such as the right to enforce the terms of a plan through appropriate equitable relief — out of existence. Certainly, a result in which fairness — a core value of our judicial system and of the common law trust principles underlying ERISA — cannot be achieved is to be avoided. Happily, that is not only possible, but was the clear intent of Congress in specifying that the terms of a plan may be enforced in equity. Just as the mere label of a remedy as "restitution" was not the final word on the nature of the claim, the mere existence of a reimbursement provision in a plan does not establish that the claim is one to enforce a contractual right. Nor is the result dictated by a need to prove fraud or wrongdoing or to engage in some legalistic tracing process not required in equity.

The Court last addressed reimbursement issues under Section 502(a)(3) of ERISA in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002). Since then, the Fourth, Fifth, Seventh and Tenth Circuits have ruled that plans may seek reimbursement from participants who have recovered from third parties because such relief was "typically available in equity." *Id.*, at 210 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993).

The Sixth and Ninth Circuits, however, prohibit plans from seeking reimbursement under Section 502(a)(3). *Qualchoice v. Rowland*, 367 F. 3d 638 (CA6 2004); *Vonderharr*, 384 F. 3d 667 (CA9 2004). The Ninth Circuit, like the Sixth Circuit, not only holds that reimbursement actions are legal as opposed to equitable, but without any support has determined that a constructive trust can be established only where there is proof of fraud or wrongdoing. *FMC Corp. v. Owens*, 122 F. 3d 1258, 1261 (CA9 1997).

The reasoning of these two Circuits (which differs) and the result of these cases is contrary to ERISA, to *Knudson*, to reasonable healthcare policy, and to common sense. Were additional circuits to adopt this minority rule, plans in those circuits, as in the Sixth and Ninth Circuits, would be deprived of an important tool to reduce the prohibitive cost of continuing to provide meaningful benefits to their participants and beneficiaries. As noted by the U.S. Department of Labor in a recent amicus brief in *BlueCross BlueShield v. Carillo*, No. 05-13344-JJ (CA11) (*http://www.dol.gov/sol/media/briefs/Carillo(A)-9-14-05.htm*) (last accessed February 22, 2006) (case still pending), "[b]y following the Sixth and Ninth Circuits and flatly prohibiting such recoveries, the district court's decision is likely to have a large economic impact on healthcare plans in this Circuit, and may lead some employers to respond by dropping or decreasing coverage."[5] Unfortunately, without enforceable reimbursement provisions, some plans literally are one catastrophic accident away from bankruptcy.

SUMMARY OF ARGUMENT

The Trust urges the Court to affirm the Fourth Circuit's decision in this case by clarifying that "appropriate equitable relief . . . to enforce . . . the terms of the plan" under the provisions of ERISA Section 502(a)(3)(B) includes relief that enforces a term requiring a participant to reimburse medical expenses advanced by the plan where the participant recovers money from a third-party tortfeasor and holds such a payments in an identifiable fund. This Court already has strongly suggested that this is correct by indicating in

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5. *See e.g., http://www.opeiufunds.org/pdf/summary_plan_description.pdf*, at 49 (section captioned "Assignment and Reimbursement to Fund of Benefit Payments for Accident or Injury") (significantly limiting benefits where a third party is responsible for healthcare costs) (last accessed on December 8, 2004).

Knudson that "restitution in equity" was "typically available in equity," but held that such a remedy was not available in that case because the participant no longer possessed the funds. *Knudson*, 534 U.S., at 213-214. Whether the participant still possessed the funds was relevant only because a reimbursement claim pursuant to the terms of a plan *is an equitable claim* cognizable under Section 502(a)(3)(B). Consequently, the Trust urges the Court to clarify this point by (1) reversing the Sixth and Ninth Circuits' rulings that reimbursement actions are legal contract enforcement claims seeking damages; (2) reversing the Ninth Circuit's determination that a constructive trust is appropriate only where fraud or wrongdoing occurs when benefits are paid; and (3) declining to enforce an unsupported tracing requirement.

ARGUMENT

When the plaintiff asserts a constructive trust claim he asserts what is traditionally viewed as an equitable claim. The case is therefore tried as an equity case, without a jury.

1 Dan B. Dobbs, Law of Remedies § 4.3(2), at 595 (1993) (emphasis added).

ERISA Section 502 (a)(3) authorizes a civil action "by a . . . fiduciary (A) to enjoin any act or practice which violates . . . the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of . . . the terms of the plan." 29 U.S.C. § 1132(a)(3). In *Knudson*, this Court held that "appropriate equitable relief" under section 502(a)(3) refers to "those categories of relief that were typically available in equity." 534 U.S., at 210 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993)). The Court went on to say that

"for restitution to lie in equity, the action . . . must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.*, at 214. *Knudson* identified two specific remedies "typically available in equity": a constructive trust and an equitable lien. Finally, the Court also explained that a constructive trust may lie for "money or property" that (1) is "identified as belonging in good conscience to the plaintiff," (2) can "clearly be traced to particular funds or property," and (3) is "in the defendant's possession." 534 U.S., at 213. Under these principles, Mid Atlantic was entitled to a constructive trust, and thus this Court should affirm the Fourth Circuit's decision.

A. Plan Reimbursement Claims Seek Appropriate Equitable Relief to Enforce Plan Terms

A majority of the circuits addressing reimbursement claims after *Knudson* have concluded that Section 502(a)(3) permits imposition of a constructive trust over specifically identifiable funds in a plan participant's possession. Below, the Fourth Circuit affirmed the district court's grant of summary judgment to a plan fiduciary seeking reimbursement of medical benefits advanced on behalf of a plan participant. *Mid Atl. Med. Servs., LLC v. Sereboff*, 407 F. 3d 212 (CA4 2005). Mid Atlantic sought reimbursement of $74,869.37 from settlement funds the Sereboffs obtained in their state court action against the tortfeasors responsible for the automobile accident that caused the plan to pay medical benefits on the Sereboffs' behalf. The Sereboffs maintained the disputed amounts in segregated, identifiable investment accounts. Agreeing with the district court, the Fourth Circuit noted that, unlike *Knudson*, Mid Atlantic "seeks equitable restitution, as that term is used in [*Knudson*], because [Mid Atlantic] seeks to recover funds that are specifically identifiable, belong in good conscience to [Mid Atlantic], and are within the possession and control of the Sereboffs."

Sereboff, 407 F. 3d, at 218; *see also Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan v. Willard*, 393 F. 3d 1119, 1121-1125 (CA10 2004); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrought*, 354 F. 3d 348, 355-358 (CA5 2003), *cert. denied*, 541 U.S. 1072 (2004). The Second Circuit also has acknowledged in *dicta* that a claim for equitable restitution would lie where a defendant holds funds that in good conscience belong to the plaintiff. *See Gerosa v. Savasta & Co., Inc.*, 329 F. 3d 317, 321 (CA2), *cert. denied*, 540 U.S. 967 (2003).

In other rulings, courts have allowed a plaintiff to seek a constructive trust over the proceeds of funds "belonging in good conscience" to the plan. *Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Fund v. Varco*, 338 F. 3d 680, 687 (CA7 2003), *cert. denied*, 542 U.S. 945 (2004); *see also Forsling v. J.J. Keller & Assocs., Inc.*, 241 F. Supp. 2d 915, 917 (ED Wis. 2003); *Allison v. Wellmark, Inc.*, No. C00-3015-MWB, 2002 WL 31818946, at *9 (ND Iowa Oct. 15, 2002); *IBEW-NECA SW. Health & Benefit Fund v. Douthitt*, 211 F. Supp. 2d 812, 815 (ND Tex. 2002), *aff'd*, 98 Fed. Appx. 306 (CA5 2004); *Bauer v. Gylten*, Nos. A3-00-161, A3-02-27, 2002 WL 664034, at *3 (D ND Apr. 22, 2002) (permitting amendment of complaint to include a constructive trust claim, pursuant to *Knudson*).

Finally, other courts, although not imposing constructive trusts, have held that ERISA plan fiduciaries state a valid claim for equitable reimbursement when disputed monies can clearly be traced to particular funds or property in the possession of a defendant other than the participant. For instance, the District Court for the District of Columbia held that a recovery agent's claim for restitution constitutes a claim for equitable relief when a portion of the settlement funds are being held in trust by the beneficiary's former attorney "for the precise purpose of reimbursing the Plan." *Primax*

Recoveries, Inc. v. Lee, 260 F. Supp. 2d 43, 48 (DDC 2003). Likewise, the District Court for the Southern District of Iowa held that an insurer properly states a claim for equitable restitution where the settlement funds are being held in an attorney's trust account. *Wellmark, Inc. v. Deguara*, 257 F. Supp. 2d 1209, 1216 (SD Iowa 2003) ("This Court finds the possession theory is the correct read of *Great-West*. That is, attempts by an ERISA plan or insurer to recover settlement proceeds to which it is entitled under a subrogation or reimbursement provision are only prohibited under § 502(a)(3) if the insured is not in the possession of clearly identifiable proceeds."). These cases are in keeping with the Supreme Court's view that "Section 502(a)(3) admits of no limit . . . on the universe of possible defendants. Indeed, § 502(a)(3) makes no mention at all of which parties may be proper defendants." *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 246 (2000).

Almost all of the cases denying claims for reimbursement involved monies that could not clearly be traced to particular funds in the defendant's possession, and therefore are not factually similar to the present case. In some cases, the funds were no longer clearly identifiable because they had been disbursed and dissipated. *See, e.g., Bauhaus USA, Inc. v. Copeland*, 292 F. 3d 439 (CA5 2002) (disputed funds were not in the defendant participant's possession because the settlement proceeds had been placed into a special needs trust); *Asbestos Workers Local No. 42 Welfare Fund v. Brewster*, 227 F. Supp. 2d 226 (D Del. 2002) (relief denied since settlement funds not specifically identifiable). In other cases, the funds were not in the defendant's possession because the beneficiary had not yet settled or obtained a judgment against the third party tortfeasor. *See Primax Recoveries Inc. v. Goss ex rel. Goss*, 240 F. Supp. 2d 800 (ND Ill. 2002); *Extendicare v. Crow*, No. Civ.A. 1:02-CV-109-C, 2002 WL 32079263 (ND Tex. Oct. 23, 2002); *Primax*

Recoveries Inc. v. Carey, 247 F. Supp. 2d 337, 342 n.5 (SDNY 2002) ("[A] constructive trust [is] an inappropriate remedy . . . when the 'settlement proceeds' are in nobody's possession, because they are the entirely hypothetical fruit of a potential future settlement that does not yet exist and may never come into being at all."). *But see Primax Recoveries Inc. v. Duffy*, 204 F. Supp. 2d 1111, 1113 (ND Ill. 2002) (allowing a lien on specific funds not yet received from underinsurance coverage).

Against this tide of authority — and in the face of *Knudson* — the Sixth and Ninth Circuits in *Qualchoice*, 367 F. 3d 638 (CA6 2004) and *Vonderharr*, 384 F. 3d 667 (CA9 2004) have rejected constructive trust actions *per se*, holding that the reimbursement right arose in contract and, therefore, the restitutionary remedy of constructive trust was in fact a legal remedy. Likewise, the Sereboffs assert that Mid Atlantic seeks "nothing more than compensatory damages for breach of contract — a classic action at law." Brief for Petitioners at 9. These arguments cannot survive scrutiny because they rest on the untenable notion that an action to enforce the terms of a plan necessarily is a contract claim. That claim must be rejected because Section 502(a)(3)(B) expressly authorizes "appropriate equitable relief" to "enforce" a plan's terms. Thus, if the existence of an express term in a plan meant that enforcing that term was an action at law for breach of contract, then no claim could be made under Section 502(a)(3)(B) for "equitable" relief.

Moreover, plans should not be penalized or restricted in enforcement remedies simply for expressly setting forth their terms. Under the Sereboffs' analysis, plans are forced into a Catch-22 by falling through a syllogistic trapdoor. If plans set forth a term for reimbursement in their plan documents, they will be enforcing a contract in any suit under Section 502(a)(3). Because all contract enforcement actions are legal, the reimbursement claim would then warrant dismissal.

Of course, if plans do not include a reimbursement term in their plan documents, they will never be enforcing — as required by Section 502(a)(3) — a plan term and thus not fall within the literal terms of that section. Therefore, under the Sereboffs' view of Section 502(a)(3), plans are damned if they do or damned if they don't set forth a reimbursement clause in their plan documents. This bizarre result which completely reads out Section 502(a)(3) from ERISA is clearly an outcome Congress never intended and cannot and should not be the law.

Furthermore, the fact that a plan seeks monetary recovery does not mean that the claim is one for damages. A constructive trust necessarily has as its object money or property. Here, the Sereboffs admit that Mid Atlantic has a superior moral claim to the funds. Pet. Brief at 21. Dobbs points out that the remedies of constructive trust and equitable lien were created at equity precisely to address such situations in which a plaintiff seeks to recover money or property that a defendant holds legal title to in an identifiable *res* (including a bank account) to which the plaintiff has a superior moral claim. 1 Dobbs, § 4.3(2) at 591, 595; *accord Knudson*, 534 U.S., at 213; *Harris Trust*, 530 U.S., at 250-251. According to Dobbs, "the constructive trust is only used when the defendant has a legally recognized right in a particular asset," and it is this right to specifically identifiable property that carries the action beyond the physical contours of the four corners of the contract that both of these circuits seemed to have felt constrained by. 1 Dobbs, § 4.3(2).

B. The Ninth Circuit's Rule Is Legally Unsupported And Effectively Precludes Recovery As Its Stringent Requirement Is Impossible To Satisfy

The Ninth Circuit, unfortunately, has gone one step further holding that a plan has no remedy under Section 502(a)(3) unless it can prove the commission of fraud or

wrongdoing *at the time it delivers funds to a defendant. FMC Corp.*, 122 F. 3d, at 1261. This theory was — or should have been — put to rest in *Harris Trust*, where this Court, quoting Dobbs, observed that "[t]he constructive trust is based on property, not wrongs." 1 Dobbs, § 4.3(2), at 597. The full passage from Dobbs' treatise explains:

> Sometimes it is still said that the constructive trust applies only to misdealings by fiduciaries in cases of fraud. But this is a misconception. The constructive trust is based on property, not wrongs. It proceeds on the notion that the defendant has legal title but that the plaintiff has the superior moral or equitable claim. This misconception probably arises in part from the trust language itself. The constructive trust terminology, like quasi-contract terminology at law, is an analogy only, but if taken literally can suggest a trust and hence a fiduciary. It also probably arises in part from the fact that in a few special cases, wrongdoing is relevant to the constructive trust. At any rate, the constructive trust is no longer limited to misconduct cases; it redresses unjust enrichment, not wrongdoing.[5]
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> 1 Dobbs, *supra*, § 4.3(2), at 597.

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5. *See also The Future of Private Pensions: Proceedings of the 2001 Annual Meeting of the Association of American Law Schools, Section on Employee Benefits*, 5 Emp. Rts. & Emp. Pol'y J. 351, 381 ("*Harris Trust* probably does mean that the extremely restrictive view of equitable relief which the Ninth Circuit has taken is overly narrow"); *see also* Lisa N. Bleed, *Enforcing Subrogation Provisions As "Appropriate Equitable Relief" Under ERISA Section 502(a)(3)*, 35 U.S.F.L. Rev. 727, 743 n.124 (2001) (explaining that *Harris Trust* did not suggest that wrongdoing is required for a valid § 502(a)(3) claim).

Despite the clear lack of any need to establish fraud or wrongdoing, the Ninth Circuit remains steadfast in holding to this standard. Indeed, even the Sixth Circuit does not accept this unsupported conclusion. *Rowland*, 367 F. 3d, at 649 ("Contrary to Rowland's assertions, a plaintiff is not necessarily required to prove wrongdoing by the defendant in order to obtain relief through imposition of a constructive trust or an equitable lien. [citing Dobbs] The constructive trust is based on property, not wrongs." (internal citations omitted)); *see also Wellmark*, 257 F. Supp. 2d, at 1214 n.7 (explaining that *Harris Trust* "did not limit recovery under Section 502(a)(3) to unlawfully transferred property").

With the emergence of the *Owens*' wrongdoing standard, the Ninth Circuit erected an insurmountable barrier that plans could never overcome in seeking reimbursement. This was no more apparent than in the two decisions the Ninth Circuit issued before this Court's ruling in *Knudson*. In 1999, the Ninth Circuit applied this rule in *Cement Masons v. Stone*, 197 F. 3d 1003 (CA9 1999), which involved a trust provision imposing an "automatic lien" on payments a participant received from a negligent third party tortfeasor. In *Stone*, the court applied the *Owens* wrongdoing requirement and dismissed the action because that requirement could not be met. In *Reynolds Metals Co. v. Ellis*, 202 F. 3d 1246 (CA9 2000), decided one year after *Stone*, the court completed its trilogy of reimbursement cases, by again applying *Owens* and rejecting the analysis showing to be *Owens* erroneous. As before, the fiduciary could not show that wrongdoing occurred in the initial transfer of benefits, and thus could not satisfy the Ninth Circuit's requirement of wrongdoing.

In 2002, this Court decided *Knudson* and held that plans could seek remedies typically available in equity to prosecute reimbursement claims under Section 502(a)(3). While the Court did not specifically disapprove of the Ninth Circuit's wrongdoing standard, it had no reason to do so given that it

had jettisoned that requirement two years before in *Harris Trust*. There, the Court (as just previously noted), quoting Dobbs, observed that the "constructive trust is about property not wrongs." In light of this observation and the absence of any mention of any wrongdoing standard in *Knudson*, it was clear that this Court would not requite the showing of wrongdoing in an action under Section 502(a)(3).

The Ninth Circuit, however, took *Knudson*'s silence on its wrongdoing standard as a license for concluding that the Court had not renounced it, leaving it a viable standard. This continued application of the wrongdoing standard resulted in predictable losses to every fiduciary suing for reimbursement in the Ninth Circuit since. *See Westaff v. Arce*, 298 F. 3d 1164, 1166-1167 (CA9 2002); *Honolulu Joint Apprenticeship & Training Cmte. of United Assoc. Loc. Un. No. 675 v. Foster*, 332 F. 3d 1234, 1237 (CA9 2003); *Providence Health Plan v. McDowell*, 361 F. 3d 1243, 1249-1250 (CA9 2004); *Vonderharr*, 384 F. 3d, at 672-673. In fact, in *Vonderharr*, the Ninth Circuit went so far as to note that *Knudson* somehow vindicated its view on the wrongdoing standard and that *Harris Trust*, a case whose facts involved some wrongdoing, still stood for the far-reaching proposition that its standard was correct. As noted by *Rowland* above and the excerpt from Dobbs, *Harris Trust* is hardly a basis for such a conclusion. If this Court remains silent on this wrongdoing standard, the Ninth Circuit will, as it has done in the post-*Knudson* era, continue to defeat plans' attempts at justifiable recovery. Should this persist, plans will be forced to consider capping, limiting, or delaying payment of benefits for accident victims.

In contrast, the principles relied on by the circuits accepting the possession theory follow the clear parameters of *Knudson*. This Court should reaffirm those guidelines and should specifically disapprove the rationale underlying the erroneous rulings of the Ninth Circuit. In particular, the Court

should emphasize that wrongdoing is not an essential element of a constructive trust claim under Section 502(a)(3). In doing so, the Court should use these renewed standards to affirm the court below and to establish a unified and consistent national legal standard regarding the scope and limitations of relief under Section 502(a)(3).

C. Tracing Requirements Do Not Bar Plan Reimbursement Claims

The Sereboffs claim that the Fourth Circuit's ruling failed to require Mid Atlantic to trace the funds it ultimately recovered from them. In their view, the funds Mid Atlantic sought were not the same as those originally paid to the healthcare providers who rendered medical services to the Sereboffs. As the Sereboffs see it, because the two sets of funds came from different sources, and because Mid Atlantic has not traced the funds it initially paid to the disputed funds the Sereboffs now hold, the relief the Fourth Circuit awarded was not that which was "typically available in equity."

The Sereboffs offer no (post-*Knudson*) authority to support this theory. Furthermore, the view that the Fourth Circuit ran afoul of tracing rules is flatly wrong. Relying on this Court's guidance in *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962), the court in *Scholastic Corp. v. Kassem*, 389 F. Supp. 2d 402, 414-415 (D Conn. 2005), considered and rejected an argument identical to that posed by Sereboffs':

> [E]ven though the funds held by Defendant[] are not the same funds that [plaintiff] paid to [the] health-care providers under the Plan, the tracing requirement for a constructive trust is surely met in this case under the Supreme Court's analysis in *Pearlman*.

In *Pearlman*, a general contractor failed to pay its subcontractors. The general contractor's surety paid the subcontractors in its place and then asserted "superior right and title [over the trustee in bankruptcy] to a fund withheld by the [landowner] out of earnings due the contractor." *Pearlman*, 371 U.S., at 133. This Court upheld the decision directing the trustee to pay over the fund, reasoning:

> Traditionally sureties compelled to pay debts for their principal have been deemed entitled to reimbursement, even without a contractual promise such as the surety here had. And probably there are few doctrines better established than that a surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed.

Id., at 136-137. This Court held that the surety had an equitable interest in funds retained by the landowner to pay the contractor, and traced the surety's right to the fund as follows:

> The [landowner] had a right to use the retained fund to pay laborers . . . [who] had a right to be paid out of the fund; . . . the contractor . . . would have become entitled to the fund; . . . and . . . the surety, having paid the laborers . . . is entitled to the benefit of all these rights to the extent necessary to reimburse it.

Id., at 141 (quoted in 3 Dobbs, *supra*, § 12.20(3), at 470 n.2). Other treatises similarly follow this tracing rule. For instance, Palmer states that:

> Through tracing, a person who in the first instance would be entitled to the restitution of money or other property would be entitled to the restitution

> of *money* or other property is often permitted to assert his claim against a substituted asset—an asset which is traceable to or the product of such money or other property. The end result of tracing may be a decree for specific restitution of the traced asset. 1 George E. Palmer, Law of Restitution § 2.14, at 187-193 (1978).

Like Dobbs, Palmer clarifies that equitable tracing does not require a precise trail of assets or property as the Sereboffs suggest. *Id.*, at § 2.15. Instead, Palmer illustrates the concept that two sets of *res* do not run afoul of a remedy in equity with the example of life insurance proceeds: If a wrongdoer converts a plaintiff's money for use as life insurance premiums, the plaintiff can trace his or her recovery to the resulting life insurance (or second *res*) created by the wrongdoer's death. These rules, in particular the ones outlined in *Pearlman*, implicitly recognize the common sense notion that payments *on behalf of* a principal are also payments *to* the principal's creditors. Payments made by responsible third parties to the principal are essentially payment back to the plan, and such payments that create identifiable property are the *res* required for seeking a constructive trust remedy. These rules arise not only from ancient and longstanding rules of equity, they embody basic notions of pragmatism and common sense. Were it otherwise, plans, as discussed previously, would simply either reduce or eliminate coverage for third party injuries (including emergency care), leaving participants injured by third party tortfeasors to recover medical costs for themselves.

D. A Plan Need Not Show That It Lacks A Remedy At Law Where It Is Pursuing A Constructive Trust Theory Seeking Recovery Of Identifiable Property

The Sereboffs erroneously assert that a party seeking a constructive trust first must demonstrate the absence of an adequate remedy at law. Again, the Sereboffs cite no authority for this proposition. They also skip over the fact that if a remedy is "typically" available in equity, the typicality of that remedy in equity presupposes that the plaintiff cannot (or need not) avail itself of any legal remedy. *Bauhaus*, 292 F. 3d, at 439 (Weiner, J., dissenting) ("When the remedy of damages is not adequate at law, equitable remedies may be sought. This doctrine is so well established that it must be credited as one kind of relief that was 'typically available in equity' — the quintessential alternate equitable remedy that becomes available when legal remedies are inadequate or nonexistent."). Dobbs echoes this theme by observing that "[w]hen the plaintiff asserts a constructive trust claim he asserts what is traditionally viewed as an equitable claim. The case is therefore tried as an equity case, without a jury." 1 Dobbs, *supra*, § 4.3(2), at 595.

Dobbs expands on this notion in his discussion of how "substantive equitable rights" trump the need for any inquiry into the adequacy of a remedy at law. When the equity courts fashioned the new right of constructive trust, they did so to address the shortcomings of the ancient writ of assumpsit, which could only provide relief where the plaintiff held title to the property in question. A constructive trust was necessary to provide a remedy where plaintiffs, who lacked legal title to property they sought and who could claim entitlement to relief only on grounds that they rightfully were entitled to it, were barred from seeking replevin-like relief on a theory bottomed on assumpsit. *Id.*, at § 4.3(2), at 591, 595; *accord Knudson*, 534 U.S., at 213; *Harris Trust*, 530 U.S., at 250-

251 (noting that "[w]henever the legal title to property is obtained through means or under circumstances 'which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have any legal estate therein'" (citations omitted).)

According to Dobbs, when equity courts sought to establish new substantive rights, as with constructive trusts, they initially engaged in an inquiry where they "wish[ed] to know whether the injury to the plaintiff is a serious one and for this purpose may ask whether it is 'irreparable.'" 1 Dobbs, *supra*, § 2.5(2) at 128. Dobbs continues by noting that once the pre-merger courts settled on that issue and created new equitable rights like constructive trust, "the question of . . . adequate legal remedy passes from the picture" since the "substantive use of 'irreparable' is not related to the remedial question." *Id.* More specifically, the adequacy of law issue "has no application" where equitable rights such as constructive trust are involved because:

> [T]he constructive trust claim is different. It is not a claim based on a legal right. On the contrary, constructive trusts are needed because legal title is in the defendant. The plaintiff seeking a constructive trust does not assert a legal right but an equitable right. In this setting the adequacy of a legal remedy *seems irrelevant.*

Id., § 4.3(2), at 595 (emphasis added). Dobbs does, however, note that the constructive trust necessarily requires the existence of some *res*. He cautions that a claim dressed up as one for constructive trust that does not identify any specific property (like the claim in *Knudson*) will be deemed to be one seeking damages. However, claims such as those in this

case, which identify specific property in investment accounts, should enjoy "an unhindered access to equity for restitution." *Id.; see also Skretvedt v. E.I. Dupont de Nemours*, 372 F. 3d 193, 213-214 (CA3 2004) (distinguishing between equitable accounting which requires showing of inadequacy of legal remedy and constructive trust (over a *res*) which does not); *cf. Knudson*, 534 U.S., at 214 n.2 (noting that an accounting coupled with constructive trust claim is an equitable remedy permissible under Section 502(a)(3)).

E. The Fact That The Settlement May Not Be Earmarked To Reimburse Medical Costs Is Irrelevant

The terms of the Sereboffs' personal injury settlement is irrelevant to the issue of reimbursement. Mid Atlantic seeks to enforce a plan term that allows it to recover medical benefits paid from a settlement between plan participants and a third party tortfeasor. Under *Knudson*, the terms of that settlement agreement are immaterial. The inquiry instead becomes whether the "money or property" (1) is "identified as belonging in good conscience to the plaintiff," (2) can "clearly be traced to particular funds or property," and (3) is "in the defendant's possession." *Knudson*, 534 U.S., at 213. All three of these conditions are met here. The money in the investment accounts are clearly within the Sereboffs' possession. As discussed above, the amounts paid to the Sereboffs can be traced to those accounts. And, perhaps most significantly, as the Sereboffs concede (Pet. Brief at 21), the fact that Mid Atlantic paid for their medical care puts Mid Atlantic in a position to assert that the money belongs in good conscience to Mid Atlantic.

Any contrary rule would encourage the Sereboffs, and participants like them, to engage in the gamesmanship of structuring settlements to avoid payment of reimbursement costs to plans. This would lead to absurd results hardly

contemplated by Congress when enacting ERISA and would spawn satellite litigation by plans seeking to unearth the true intent underlying settlements, just as the IRS does in seeking to pierce fraudulent employment law settlements calling only for settlement of personal injuries. That result is bad policy and should not be law.

CONCLUSION

For these reasons, the Trust, as amicus, respectfully requests that the Court affirm the judgment of the Fourth Circuit Court of Appeals and issue a decision specifically disapproving the Ninth Circuit's rule requiring wrongdoing when seeking a constructive trust under Section 502(a)(3).

Respectfully submitted,

DESMOND C. LEE
DECARLO & CONNOR
533 South Freemont Avenue
Los Angeles, CA 90071
(213) 488-4100

Counsel for Amicus Curiae